

1716858 (Migration) [2019] AATA 5632 (22 November 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1716858
MEMBER:	Jennifer Cripps Watts
DATE:	22 November 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas: • Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations.

Statement made on 22 November 2019 at 4:17pm

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 (Employer Nomination Scheme) – Public Interest Criterion 4020 – false or misleading information in application – second applicant’s criminal conviction and sentence in home country not declared – low-level offence, no prison term, conditions of sentence met and conviction removed from records – no dispute as to non-declaration – discretion to waive criterion – compassionate or compelling circumstances affecting interests of Australian citizen – applicant’s work record and value to employer – decision under review remitted

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4. **LEGISLATION**

5. *Migration Act 1959 (Cth), s 65*

6. *Migration Regulations 1994 (Cth), Schedule 2, cl 186.213, Schedule 4, criterion 4020(1), (5)*

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

7. This is an application for review of a decision made by a delegate of the Minister for Immigration (the delegate) on 18 July 2017 to refuse to grant the applicants - Employer Nomination (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
8. The applicants applied for the visas on 19 March 2015. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.186.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant did not satisfy the Public Interest Criteria (PIC) 4020.
9. The applicants appeared before the Tribunal on 21 November 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Mr [A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish (Central and South America) and English languages.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.186.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

13. Background

14. The applicant is a citizen of Colombia who first came to Australia 2007, with her husband and son. They held student visas. The applicant is a qualified accountant, who was awarded a Bachelor of Accounting in Colombia in 2003. While studying in Australia, she upgraded her accounting skills by undertaking additional tertiary courses in Sydney, from 2008 to 2015, and during this period commenced work in 2011 as an Accountant for the company named in her visa application as the nominating company, [Company Name], whose nomination was approved on 22 June 2015.
15. The applicant lodged her Temporary Residence Transition Subclass 186 visa application on 19 March 2015 and in the application declared that none of the applicants had ever been convicted of an offence in any country (including any conviction which is now removed from the official records). This information was not correct and, on 8 March 2017, the applicant was notified by the Department, in writing, of adverse information. The adverse information is that in 1995 the second-named applicant had committed an offence in Colombia, for which he was convicted and sentenced in 1997. The applicant provided a response to the Department's procedural fairness letter and, essentially, did not dispute the nature and circumstances of the offence or that she had not declared it in her visa application.

Has the applicant given, or caused to be given, a bogus document, or information that is false or misleading in material particular?

16. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
17. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
19. At the Tribunal hearing, the matter of the non-disclosure of the second-named applicant's 1997 Colombian conviction was discussed, as was the reason why the applicant did not disclose it in the current visa application. Although not a material matter, the circumstances of the case and the sentence that was imposed are considered by the Tribunal to be at a low level of offending and, it is noted, the offence was committed 24 years ago. The second-named applicant did not go to prison. The sentence was akin to a New South Wales intensive corrections order, or similar to bail conditions. It included the second-named applicant lodging a cash bond and the condition that he had to attend a police station once a month for two years. At the end of the two year period, after the sentence had been served, the bond was returned to him. On 25 April 2000, the conviction was removed from official records in Colombia.

20. The applicant was considered to highly credible in her presentation at the Tribunal hearing. She was co-operative and gave oral evidence spontaneously and in a cogent manner. The applicant takes full responsibility for providing false or misleading information in the visa application and is deeply remorseful for not disclosing the criminal matter of the second-named applicant, who was a person over 16 years of age at the time of application. The Tribunal is satisfied her remorse is genuine. Again, although not material, it is noted by the Tribunal that at the time of application both the applicant and her husband, who have resided in Australia since 2007, provided Australian Federal Police Complete Disclosure certificates indicating no disclosable outcomes, indicating that for the period they have been residing in Australia the second-named applicant has, as he claims in his 2017 statutory declaration on the Department file, been a 'law-abiding' citizen.
21. There is no evidence before the Tribunal to suggest that the applicant provided a bogus document. The Tribunal has considered all relevant evidence, including the oral statement at the Tribunal hearing by the applicant that she does not dispute that she gave false or misleading information in her visa application by not declaring the second-named applicant's 1997 conviction in Colombia.
22. For these reasons, the Tribunal finds that the applicant gave information that is false or misleading in a material particular', as defined in PIC 4020(5), relevant to the character requirements criteria in cl.186.213, which is criteria the Minister may consider when making a decision on an application.
23. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

24. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
25. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
26. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
27. The applicant is claiming that the requirements should be waived, not in the interests of Australia, but on the basis of compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.
28. Mr [A], the applicant's boss and owner of the company, attended the hearing in person to give oral evidence about the value that the applicant brings to the business in her role as an Accountant. Mr [A], who is an Australian citizen, gave evidence that:
 - a. The applicant is a 'standout' employee who 'consistently delivers above and beyond what is expected' and she is an 'amazing professional' with outstanding capabilities who provides training to Australian team members;

- b. She is effectively his right hand person in the running of the company;
 - c. It would be very difficult to replace the applicant, due to her exceptional data collection and analysis skills, software knowledge and training capabilities;
 - d. The applicant has devised and implemented an inventory management system that has resulted in increased revenue;
 - e. If he needed to recruit a new person to replace her, his business would suffer financially, he would incur substantial losses and expense, including recruitment fees and provision of training to a new person;
 - f. Giving evidence at the Tribunal in the applicant's visa matter is not something that he would be likely to do for another employee, but he is 'very nervous to lose her' because it will 'really hurt the business'.
29. 'Compelling' or 'compassionate' circumstances are not defined in the Act or Regulations. It is up to the Tribunal, in the circumstances of the case, as a subjective judgment, to decide whether the circumstances are compelling or compassionate. Mr [A] was also considered to be a credible witness. On the evidence considered as a whole, and in the particular circumstances of this case, the Tribunal is satisfied that there are compelling circumstances that would affect an Australian citizen, Mr [A], that justify waiving the requirements of PIC 4020.
30. Therefore the requirements of PIC 4020(1) and (2) should be waived.

Has the applicant satisfied the identity requirements?

31. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal that indicates the applicant's identity is in question.
32. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

33. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
34. There is no evidence before the Tribunal that indicates the applicants have been refused visas because of a failure to satisfy the identity requirements in PIC 4020(2A). Therefore PIC 4020(2B) does not apply.
35. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.186.213.
36. On the Department file is a s.376 certificate, signed and dated 15 October 2019. It was provided to the applicant at the hearing, the essence of the information was given to her and she was informed that the Tribunal considered the certificate to be valid. The applicant was invited to comment, agreed the certificate was valid and indicated she did not wish to comment further.

DECISION

37. The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas:
- Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations.
- 38.

Jennifer Cripps Watts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...